SACRAMENTO OFFICE:
P.O. Box 276600 • Sacramento, CA 95827
916.857.6900 • FAX 916.857.6902
www.pacificjustice.org

PACIFIC JUSTICE INSTITUTE

BRAD W. DACUS, ESQ.
President
EDWIN MEESE, III
Former Attorney General
Advisory Board Chairman

November 14, 2008

Chief Justice Ronald M. George
and the Associate Justices of the
California Supreme Court
350 McAllister Street
San Francisco, CA 94102

Letter Brief of Amicus Curiae Urging Denial of Petition for Writ in *City and County of San Francisco, et al. v. Horton, et al.,* Case No. S168078

Honorable Justices:

Pacific Justice Institute, on its own behalf, submits this *amicus* letter brief to address the legal standards for granting the Petition for Writ of Mandate to prevent the implementation of Proposition 8.

Summary of the Argument

The Petition for Writ should be denied for the following reason:

1. The Petitioners, as political subdivisions of the state, do not have standing to seek invalidation of a duly-enacted statewide ballot initiative.

Interest of Amicus Curiae

Pacific Justice Institute is a nonprofit organization which has provided extensive legal counsel and representation to religious organizations and people of faith relative to amending the California Constitution so that marriage is defined with clear parameters. In addition, Pacific Justice Institute attorneys represent scores of churches in securing their expressive rights of religion, speech, and

association under the U.S. and California Constitutions, as well as protecting them from interference by the government in theological and ecclesiastical matters in violation of the Establishment Clause.

Argument

I. The Petitioners have not established their standing to seek the extraordinary writ relief they are demanding.

The instant Petition for Writ of Mandate seeks to invalidate the election results of November 4, 2008, in which more than five million California voters reaffirmed the definition of marriage in California as being only between a man and a woman. The Petition argues primarily that the people's adoption of this constitutional amendment was a "revision" which could not be accomplished through the initiative process.

In their haste to persuade the Court that millions of voters got it wrong on November 4, the Petitioners gloss over the critical issue of their ability to even seek the relief requested.

A. Petitioners give short shrift to their respective legal interests in the enforcement of Prop. 8.

In paragraphs 5-7 of the Petition, the moving parties are identified as charter cities and counties, respectively, which sheds no light on their standing to file the Petition. In its "Claims Asserted" section, Petitioners urge that they "and the citizens of California will suffer irreparable injury and damage" unless this Court strikes down Prop. 8. San Francisco then urges that it cannot comply with Prop. 8 "without violating the equal protection rights of its residents," and further that Prop. 8 will cause an unspecified "adverse financial impact." San Francisco concludes that it has a beneficial interest in that it "is on the forefront of the struggle for equality." Petition, at ¶ 15.

Petitioner Santa Clara predicts less dire consequences to itself than does San Francisco, arguing simply that it has a "beneficial interest in Respondents' compliance" with Prop. 8 because the Proposition would allegedly "force Santa Clara to violate the constitutional rights of its residents by denying them marriage licenses." Santa Clara vaguely concludes that it "has an interest in protecting the rights of its residents and would be harmed if required to act in contravention of

the rights of its lesbian and gay residents." *Id.* at ¶ 16. Los Angeles' interest is set forth identically to the first and third sentence of Santa Clara's stated interest, omitting only the statement as to denying marriage licenses.

As explained below, the stated interests are woefully inadequate to justify the Petitioners' attack on a statewide proposition for the reasons stated below.

B. Standing cannot be overlooked, particularly in this original proceeding.

Petitioners invoke the doctrine of separation of powers, see Pet. Memo. at 17. Yet they ignore the vital role that standing plays in ensuring that the courts stay anchored to their constitutional moorings by hearing only legitimate controversies.

"Without standing, there is no actual or justiciable controversy, and courts will not entertain such cases." *Shappell Industries, Inc. v. Superior Ct.*, 132 Cal. App. 4th 1101, 1111 (App. 2 Dist. 2005). Standing, of course, prevents litigants from running to court anytime they believe general injustices are taking place. Rather, "The fundamental aspect of standing is that it focuses on the party seeking to get his complaint before a ... court, and not in the issues he wishes to have adjudicated." (*Harman v. City and County of San Francisco* (1972) 7 Cal.3d 150, 159.

This Court declined to address the standing issue in *In re Marriage Cases*, (2008) 43 Cal. 4th 757, 791 n. 9, largely because the issue had not been addressed by the lower courts. By contrast, the instant case is an original proceeding not encumbered by years of prior litigation. As such, the question of standing is squarely before the Court. The problems with the Petitioners standing are legion, as partly demonstrated by their brief. They are neither members nor authorized representatives of any protected class. Rather, they are suing state entities of which they are themselves political subdivisions. And they are attacking a ballot initiative approved by hundreds of thousands of citizens whose tax dollars they are using to finance the litigation. Allowing Petitioners to proceed would abrogate time-honored safeguards of standing and violate taxpayers' trust.

C. Political subdivisions of the state do not have standing to challenge constitutional amendments.

First, San Francisco is not a member of the class that it is seeking to represent. In *Community Television of So. Cal. v. County of Los Angeles,* 44 Cal.App.3d 990 (1975), the City and County of Los Angeles challenged the constitutionality of a provision of the tax code (former Rev. & Tax. Code § 271.4) based in part on equal protection grounds. The Court held that "as a political subdivision of the state and not being parties who belong to a class allegedly discriminated against, [the City and County of Los Angeles] lack the standing to make such a challenge." (*Id.* at 998.) The court evaluated the federal and state equal protection clauses together for purposes of standing.

Petitioners—as non-human government entities—do not have a sexual orientation or any ability to marry. In that vein, a "line of Supreme Court cases . . . stand generally for the proposition that creatures of the state have no standing to invoke certain constitutional provisions in opposition to the will of their creator." (*Board of Administration v. Wilson* 57 Cal .App. 4th 967, 975 (1997) (internal citations omitted). S*ee also, Coleman v. Miller* (1939) 307 U.S. 433 [59 S.Ct. 972] (1939); *City of Trenton v. New Jersey* 262 U.S. 182 [43 S.Ct. 534] (1923); *Township of River Vale v. Town of Orangetown* 403 F.2d 684, 686 (2nd Cir. 1968)(collecting cases).

Petitioners' good intentions and passionate beliefs in gay rights do not a constitutional injury make.

D. Allowing local governments to use taxpayer monies to launch legal challenges against voter-approved measures undermines the initiative process.

In *Lockyer v. City and County of San Francisco,* 33 Cal. 4th 1055, 1081 (2004), this Court advised City officials unhappy with statutes limiting marriage to a man and a woman that the proper means of setting up a test case would have been to "den[y] a same-sex couple's request for marriage license and *advise the couple* to challenge the denial in superior court.".) *Id* (emphasis added). The same approach could be taken here, although even that is unnecessary as Prop. 8 is being simultaneously challenged by gay couples with much better prospects for establishing standing. *Strauss, et al. v. Horton, et al.,* No. S168047 (filed November 5, 2008).

Insofar as representative capacity may be concerned, Petitioners are political subdivisions which collectively contain hundreds of thousands of voters who supported Prop. 8. For instance, an estimated 400,000 voters in the City of Los Angeles voted "yes" on Prop. 8.[1] They were joined by approximately 87,000 voters in the City and County of San Francisco[2] and 244,000 in Santa Clara County.[3] Petitioners offer no authority for their underlying belief that they can invest untold taxpayer resources into challenging the votes of more than 700,000 of their own constituents. Such an approach is unconscionable—and further demonstrates why the litigation must be pursued, if at all, by private parties actually aggrieved by the passage of Prop. 8.

E. If standing is granted to the Petitioners, it cannot be limited to them.

The Petitioners' cursory attempts to establish standing would, if successful, necessitate granting standing to a host of other individuals and groups to intervene in the litigation or file suits of their own. Petitioners represent only three of the thousands of municipalities and counties in California that could assert similar—or opposing—interests on behalf of their citizens. The Court need not open this door

---

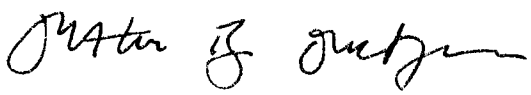
[1] http://projects.latimes.com/elections/la-county-prop-8-results-by-city/ (last visited 11/12/2008).
[2] http://www.sfgov.org/site/elections_index.asp?id=70720 (last visited 11/12/2008).
[3] http://vote.sos.ca.gov/Returns/props/map190000000008.htm (last visited 11/12/2008).

CONCLUSION

County and municipal entities, as political subdivisions of the state, do not have standing to file legal challenges to statewide ballot initiatives. Allowing such a step would not only impede the current controversy over Prop. 8, but it would invite ambitious local politicians in any corner of the state to launch lawsuits any time they disliked the adoption of a ballot initiative.

Respectfully submitted,

PACIFIC JUSTICE INSTITUTE



Kevin T. Snider, SBN # 170988
Matthew B. McReynolds, SBN # 234797

Attorneys for Pacific Justice Institute

PROOF OF SERVICE

I declare that I am, and was at the time of the service hereinafter mentioned, at least 18 years of age and not a party to the above-entitled action. I am employed in the City and County of Sacramento. My business address is 9851 Horn Road, Ste. 115, Sacramento, CA 95827. On November 12, 2008, I caused to be served the following document.

AMICUS CURIAE LETTER IN OPPOSITION TO THE PETITION FOR WRIT OF MANDATE FILED BY THE CITY AND COUNTY OF SAN FRANCISCO (SAN FRANCISCO, ET AL. v. HORTON, ET AL.)

By placing a true copy thereof in an envelope addressed to each of the persons named below at the address shown, in the following manner:

SEE ATTACHED SERVICE LIST

BY OVERNIGHT MAIL: I placed a true copy in a sealed envelope addressed as indicated below, on the above-mentioned date. I am familiar with the firm's practice of collection and processing correspondence for delivery by Federal Express (Fed Ex). Pursuant to that practice, envelopes placed for collection at designated locations during designated hours are delivered to Fed Ex with a fully completed air bill, under which all delivery charges are paid by the Pacific Justice Institute, that same day in the ordinary course of business.

Service on the parties below:

Attorneys for Petitioners:

Dennis J. Herrera
City Attorney
Therese M. Stewart
Chief Deputy City Attorney
Vince Chabria
Tara M. Steeley
Mollie Lee
Deputy City Attorneys
City Hall, Room 234
One Dr. Carlton B. Goodlett Place
San Francisco, CA 94102-4682
Telephone: (415) 554-4708
Facsimile: (415) 5544699

Ann Miller Ravel
County Counsel

Tamara Lange
Lead Deputy County Counsel
Juniper Lesnik
Impact Litigation Fellow
Office Of The County Counsel
70 West Hedding Street
East Wing Ninth Floor
San Jose, California 95110-1770
Telephone: (408) 299-5900
Facsimile: (408) 292-7240

Rockard J. Delgadillo
City Attorney
Richard H Llewellyn, Jr.
Chief Deputy City Attorney
David Michaelson
Chief Assistant City Attorney
Office of the Los Angeles City Attorney
200 N. Main Street
City Hall East, Room 800
Los Angeles, CA 90012
Telephone: (213) 978-8100
Facsimile: (213) 978-8312

Respondents:

Mark B. Horton, MD, MSPH
State Registrar of Vital Statistics
Of the State of California and
Director of the California Department of
Public Health
1615 Capital Avenue, Suite 73.720
P.O. Box 997377 MS 0500
Sacramento, CA 95899-7377
(916) 558-1700

Linette Scott, MD MPH
Deputy Director of Health Information and
Strategic Planning of California
Department of Public Health
1616 Capital Avenue, Suite 74.317
Mail Stop 5000
Sacramento, CA 95814
(916) 440-7350

Edmund G. Brown, Jr.
California Attorney General
1300 "I" Street
P.O. Box 94255
Sacramento, CA 94244-2550
(916) 445-9555

I certify under penalty of perjury that the foregoing is true and correct, and that this Certificate of Service was executed by me on November 12, 2008, at Sacramento, California.

Ryan Losey